The Industrial Court

There are quite a number of textbooks on labour relations and numerous articles on the subject have appeared in law journals and elsewhere. But all of us are not *au fait* with the practical functioning of the industrial court. The President of the Court, adv DJ de Villiers SC, was therefore requested to enlighten us and it gives us pleasure to publish his reaction.

The industrial court, as we know it today, only came into being 11 years ago (1 October 1979) following the Wiehahn Commission's recommendations. Its predecessor, the Industrial Tribunal, consisted of retired officials from all walks of life. There was no court building and the tribunal travelled all over the country, including the then South West Africa, to determine labour disputes.

The industrial court has countrywide jurisdiction and it can therefore sit anywhere within the Republic. It operated countrywide from its permanent seat in Pretoria until 1985, when a permanent court was established in Cape Town as well as one in Durban in 1986. A further permanent court will be established in Port Elizabeth during April 1991. The court also goes on circuit to rural areas for the convenience of the litigants.

At present the court consists of the president, the deputy president and five permanent members in Pretoria, three permanent members in Durban, two in Cape Town and one in Port Elizabeth. For the rest copious use is made of *ad hoc* members, who are mostly practising advocates and academics. All the permanent members are LLB graduates and two have LLM degrees.

The permanent members of the court are the following:

Pretoria
Adv DJ de Villiers, SC (President)
Adv MAE Bulbulia (Deputy President)
Adv TM Dannhauser
Adv DJ Pienaar
Mr RS Roth
Adv MM Beän
Adv FFJ Brand (will join the ranks next month)

Durban
Mr A de Kock (Head of office)
Mr MP Freemantle
Adv SJ van Zyl

Cape Town
Adv JP van Niekerk (Head of office)
Adv PP de Klerk

Port Elizabeth
Ms JM Duff

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Because the industrial court is a creature of statute it has no inherent jurisdiction like the Supreme Court. It can only exercise the powers conferred upon it by section 17(11) of the Labour Relations Act (LRA) in terms of which the functions of the court are spelt out, which are *inter alia* to grant urgent interim releif eg an interdict, pending a *status quo* order, to grant a *status quo* order in a dispute concerning an alleged unfair labour practice as interim relief pending a final determination, to make such final determinations, to decide any appeal from a decision of the industrial registrar and appeals by an employer or registered employer's organisation or registered trade union who feels aggrieved by the refusal of his or its application for admission as a party to an industrial council, to conduct arbitrations and to determine any question which relates to demarcations between industries.

The industrial court therefore fulfils quasi-judicial and advisory functions. According to the Appellate Division in *SA Technical Officials' Association v President of the Industrial Court* 1985 1 SA 597 (A) the industrial court is not a court of law, but a court of equity.

Most of the courts' time is however taken up by hearings in court in order to make a final determination in labour disputes concerning alleged unfair labour practices, eg dismissals, retrenchments, unilateral changes in working conditions, strikes, lockouts, and overtime bans.

The Pretoria office has ten courtrooms, Durban has four, Cape Town three and Port Elizabeth one, and cases are enrolled for all these courts daily.

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What then is a court of equity? This can best be explained by comparing it with the Supreme Court, which is a court of law. Brassey *et al*: *The New Labour Law* explain this difference as follows at 316:

It should, however, be borne in mind that the jurisdiction of the Supreme Court differs from that of the industrial court. While the Supreme Court is, within the context of dismissals and ancillary relief, exclusively concerned with the application of common-law and law of contract principles as well as with the applicable statutory provisions, the industrial court may and indeed must take into account principles of fairness when considering a status quo application or an unfair labour practice determination. The result is that a specific case may be approached from different angles and may lead to contradictory results. This is quite possible as the industrial court is to be viewed as a court of equity which is not primarily concerned with the enforcement of legal rights.

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The following is an example of contradictory results that could arise in the two courts:

An employer may for instance bring an urgent application in the Supreme Court and be granted an order for the eviction from hostels of striking employees who had been dismissed (as such an order cannot be granted by the industrial court), while the industrial court may at the same time grant an order for the interim reinstatement of these very same employees, as the industrial court is obliged to consider aspects of fairness and reasonableness (equity), which would not have been a factor in the Supreme Court judgment.

Parties can approach either the Supreme Court or the industrial court for urgent interim interdicts. This of course is a very unsatisfactory state of affairs, since parties are allowed to go "forum shopping" and to institute proceedings in a court where they think they might get the best deal.

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There are also the following further differences between the industrial court and the Supreme Court:

(a) The industrial court has limited powers and functions which can only be exercised within the explicit framework of the Act;
(b) unfortunately, there is no provision in the Act for the industrial court to enforce its own orders. It can only ask the Supreme Court to make a certified copy of its order, an order of the Supreme Court, and then execute on that;
(c) the industrial court has only limited powers in granting orders for costs. Even where it can grant cost orders this is sparingly done, so as not to discourage the parties from using the court, as there is normally still an ongoing relationship between employer and employee;
(d) the industrial court cannot charge a person with contempt: It can only lay a charge of contempt with the police and then the matter has to be dealt with in a criminal court;
(e) a party, who is not legally represented in the industrial court, may object to the other party being legally represented. The court must then decide whether to allow it or not, and usually allows legal representation, if the case is for example complicated;
(f) the industrial court is not bound by previous decisions of the court although in practice it tries to follow previous decisions, as far as possible.

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According to the Appellate Division the industrial court has "draconian powers" when it exercises a power specifically granted in the Act. It however went on to remark as follows in *Consolidated Frame Cotton Corporation v President of the Industrial Court* 1986 3 SA 786 (A) 799B: "In entrusting the power to a *quasi*-judicial body, which it was contemplated would have special skills and knowledge in the field of labour relations, the Legislature must be presumed to have intended that the powers would be exercised reasonably and equitably, and with due regard to the interests not only of the employees but also of the employers."

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The court is often criticised by labour lawyers for the way it interprets provisions of the Act, but in most cases, such criticism is actually aimed at the system, ie at the legislator for enacting unpopular and disliked pieces of legislation. This has been especially so after the 1988 amendment of the LRA. Unions especially felt it was unfair in many respect and *inter alia* enacted to protect the employer against striking workers.

These unpopular amendments have led to much labour unrest and industrial action, which contributed to the Minister directing the National Manpower Commission (NMC) to investigate and prepare a draft on the consolidation of the LRA. Submissions to this end were requested in the *Government Gazette* of 13 October 1989.

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The NMC received many divergent views and subsequently issued a working document containing provisional proposals aimed at stimulating debate on the principles which should form the basis of a revised or consolidated LRA. This new legislation could probably not be enacted before 1992.

In the meantime SACCOLA (the South African Employers' Consultative Committee on Labour Affairs) and COSATU (the Congress of South African Trade Unions) and NACTU (the National Council of Trade Unions) are not prepared to wait till 1992 for the response to these proposed amendments and they have drawn up an agreement on interim amendments they want the Minister to enact during February 1991.

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After the controversial 1988 amendments, many unions vowed to boycott the industrial court. For a month or two there was a decrease in the number of cases filed at court, but overall the steady increase in cases is continuing, as can be seen from the following statistics of cases filed:

1979 :	4	1985 :	801
1980 :	15	1986 :	2 042
1981 :	30	1987 :	3 533
1982 :	41	1988 :	3 838
1983 :	168	1989 :	5 547
1984 :	399	1990 :	6 663

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It is now practically certain that farm labourers will in the near future fall under the provisions of the LRA. The NMC is investigating the possibility of establishing Small Labour Courts on the platteland to cope with most of the farm labour disputes and other less complicated cases.

The South African Transport Services Act and the Post Office Act both provide that their employees will fall under the LRA some time after privatisation. If we add to this the possibility that civil servants and domestic servants may also soon fall under the Act, the industrial court, as presently constituted, might easily burst out of its seams. ■